No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, and ANNA ANDERSON,

Appellees.

BRIEF OF APPELLEE, WARREN H. PILLSBURY.

JAMES M. CARTER,
United States Attorney,
CLYDE C. DOWNING,
Asst. U. S. Attorney,
Chief of Civil Division;
LEILA F. BULGRIN,
Asst. U. S. Attorney,
600 Federal Building, Los Angeles 12,
Attorneys for Appellee, Warren H. Pillsbury.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLEE, WARREN H. PILLSBURY.

I.

JURISDICTIONAL STATEMENT.

The United States District Court had jurisdiction in this case in that the complaint was filed under the provisions of 33 U. S. C. 921(b), 44 Stat. 1434, 49 Stat. 1921 [T. 2]. This court has jurisdiction under the provisions of Title 28, Section 1291, of the United States Code.

II.
STATEMENT OF THE CASE.

This is an appeal from a decision of the United States District Court for the Southern District of California, Central Division, Honorable Ben Harrison, District Judge, affirming a Compensation Order of the Deputy Commission, appellee, filed on February 27, 1948. The said Compensation Order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1434, 33 U. S. C. A., Sections 901 *et seq.*, and awarded a death benefit to Anna Anderson, widow of John A. Anderson who sustained fatal injuries on November 29, 1947, while employed as a longshoreman by the Burns Steamship Company on the "S. S. Daisy Gray" in Los Angeles Harbor, California. The compensation liability of the employer was insured by the appellant, Associated Indemnity Corporation [T. 3].

The claim for compensation was controverted by the employer and the insurance carrier upon the ground that the injuries did not arise out of and in the course of employment. A hearing was held before the Deputy Commissioner on December 16, 1947. The testimony at said hearing is printed in the Transcript of Record and will be referred to hereafter. After the Compensation Order was filed, the employer and carrier instituted a proceeding for judicial review of the Compensation Order pursuant to Section 21(b) of the Longshoremen's Act (33 U. S. C. A., Section 921(b)), alleging in substance that the Compensation Order is not in accordance with law in that the evidence does not support the finding that the injury arose out of and in the course of employment [T. 2]. Thereafter, both the plaintiffs and the defendant, Pillsbury, moved for summary judgment [T. 12, 45]. All

parties stipulated that the transcript of testimony before Pillsbury should be deemed a part of said motions [T. 46]. Subsequently, the court denied the plaintiffs' motion and granted the defendant Pillsbury's motion for summary judgment. Judgment was entered [T. 48] and the plaintiffs filed a notice of appeal on November 5, 1948 [T. 50].

III.
STATUTE INVOLVED.

The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1434, 33 U. S. C. A., Section 901 *et seq.*

Section 902(2) provides as follows:

> "The term 'injury' means accidental injury or death arising out of and in the course of employment, * * *."

Section 903(b) provides as follows:

> "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

Section 904(b) provides as follows:

> "Compensation shall be payable irrespective of fault as a cause for the injury."

Section 905, provides, in part, as follows:

> "* * * In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

Section 920 provides as follows:

"Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

"(a) That the claim comes within the provisions of this chapter.

"(b) That sufficient notice of such claim has been given.

"(c) That the injury was not occasioned solely by the intoxication of the injured employee.

"(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, §20, 44 Stat. 1436.)"

Section 921(b) provides as follows:

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the district of Columbia if the injury occurred in the District). * * *"

IV.
FACTS.

The Deputy Commissioner in the Compensation Order complained of found the facts with reference to the employee's fatal injury to be in part as follows:

"That on the 29th day of November, 1947, John A. Anderson, husband of the claimant herein, was in the employ of the employer above named at Los Angeles Harbor in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Associated Indemnity Corp.; that on said day the said John A. Anderson while performing service for the employer as a longshoreman and engaged in stevedoring operations on the 'SS Daisy Gray' afloat on Navigable waters of the United States at said harbor sustained personal injury occurring in the course of and arising out of his employment and resulting in his death the same day as follows: (7) The said employee, while acting as hatch-tender, was signalling the bringing on board by the ship's winches of a sling load of coal for use in ship. The sling load swung against him, causing injuries from which he died the same day. He had been previously requested by the ship's mate, a superior officer, to let such sling load of coal remain on the dock that it might be brought on board later by members of the ship's crew who would operate winches at the next hatch. The reasons for his disregarding said request are not known, although it may be surmised that he did so in order to obtain the sling in which said coal had been placed for the purpose of using it to discharge some waste and scrap wood on the deck to the dock, an act permitted by the employer; that the act of bringing said coal on board was within

the general scope of his duties in that it was part of his work to direct the winches in the loading and unloading of the ship, including occasional loading of ship's stores, and that his failure to comply with said direction of the mate was an act of minor disobedience in the course of his work and not an act taking himself outside the scope and course of his employment."

V.
QUESTION INVOLVED.

Is the finding of the Deputy Commissioner that the injury arose out of and in the course of employment supported by the evidence?

VI.
THE ARGUMENT.

The Finding of the Deputy Commissioner That the Injury Arose Out of and in the Course of Employment Is Supported by Evidence.

The following is a reference to so much of the testimony taken before the Deputy Commissioner on December 16, 1947, as is considered sufficient to show that the above-mentioned finding of fact of the Deputy Commissioner is supported by evidence. This reference is not intended to cover all of the testimony, as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the Deputy Commissioner.

At the commencement of the hearing before the Deputy Commissioner on December 16, 1947, it was stipulated in part that:

1. John A. Anderson, husband of the claimant herein, was in the employ of defendant, Burns Steamship Company, at San Pedro, California, on and about November

29, 1947, as the winch driver and hatch tender, and at said time said employer was insured against liability under the Longshoremen's and Harbor Workers' Compensation Act by insurance with the defendant, Associated Indemnity Company.

2. That he met with fatal injury on said date on said vessel.

3. That the claim is within the provisions of said Act [T. 16].

Ernest L. Bliss testified that he was chief mate on the "S. S. Daisy Gray" and knew John Anderson; that he saw him sustain his injury when he was struck by a sling load of coal which was being swung from the gangway to No. 2 hatch along the area-way on the port side of the vessel [T. 20]; that the coal was being loaded from the dock to the vessel; that at the time Anderson was working as one of two longshoremen known as winch drivers and that he was then acting as the hatch tender and had given the signal to raise the sling of coal to place it aboard ship; that about seven or eight minutes before the accident and at about the same spot where Anderson was struck the witness had a conversation with Anderson [T. 21]; that Anderson asked him if he could use the sling which was on the dock loaded with coal to bring the coal aboard but that he told Anderson it could not be done with No. 1 gear because it had to be taken to the starboard side and the vessel was portside to the dock; that Anderson then asked him why he could not take the load aboard with No. 1 gear and he told Anderson because it had to go on the starboard side and that the sailors would take it aboard with No. 2 gear when they got through with the No. 3 gear; that during this conversation Anderson told him that he wanted the sling to get certain lumber off the deck of the vessel

so that it could be made available as firewood [T. 22, 23]; that as far as the lumber is concerned there was the question whether it would be removed by the crew or the longshoremen, but it would be taken off the vessel in any event or it might be thrown over at sea [T. 24, 25]; that there is no common practice about the removal of the trash lumber; that there are two men who work at a hatch, the operator of the winch and the hatch tender and that Henry Tornquist was the operator of the winch; that he (the witness) does not, however, give orders for every sling load; that there always have been two winch drivers working together; *that the lumber that goes off is strictly up to them* [T. 26]; *that the coal in question belonged to the ship and was to be brought aboard ship sooner or later; that it was in a sling on the dock waiting to be lifted aboard but he preferred to have it brought in by a different winch and on a different side* [T. 28, 29]; *that the sling on which the coal was brought aboard belonged to the vessel; that the hatch tender (Anderson) was in immediate charge of moving of the loads* [T. 31, 32].

Henry Tornquist testified that he was a longshoreman and winch driver-hatch tender and that on November 29 last he was driving the winch on the "S. S. Daisy Gray" at the time of this accident [T. 32]; that Anderson told him to pick up the load of coal; that he picked up the sling load of coal and when the load swung back it dropped down; that he did not see Anderson [T. 33] when he was hit [T. 34]; that he had just deposited a load of lumber on the dock and then picked up the load of coal in the same sling instead of coming back empty [T. 34]; that just before Anderson directed him to lift this coal he saw Anderson talking with Mate Bliss but could not hear the conversation, but that right afterwards Anderson

told him to bring the coal aboard [T. 34]; *that he has loaded the cook's coal before, many times, and on this ship off and on* [T. 35]; *that sometimes the ship's crew takes this coal aboard and sometimes the longshoremen do when the crew is busy and the longshoremen get through their work before them;* and that generally ship's stores are taken aboard by the longshoremen gang if the sailors are behind in their work, and *that at the time in question the sailors were working at hatch No. 3 while the longshoremen who had been working at No. 2 hatch were through* [T. 36]; that the coal could be carried from the dock to the deck either by No. 1 or No. 2 gear, but No. 2 gear was not rigged up [T. 33]; that the coal could be moved from the portside deck to starboard by No. 2 gear, which they actually did later; that when he picked up the coal he didn't know whether he was to leave it on deck or dump it out of the sling as he did not know what Anderson intended doing with the sling [T. 34]; that at the time they were finishing the job having the vessel almost loaded at the time of the accident [T. 35].

Ernest L. Bliss, chief mate, after hearing the testimony of the previous witness, Henry Tornquist, further testified as follows:

> "I would like to say one more thing. *The longshoremen,* as he stated, *do sometimes occasionally hook onto something and bring it on board ship,* but when they bring it on board they land it, but *the sailors always take it and store it.* The sailors will finish storing it; they only bring it on board the ship." [T. 41].

It is respectfully submitted that the evidence above referred to supports the Deputy Commissioner's finding to the effect that the death arose out of and in the course of the employment and under the authorities should be

considered as final and conclusive. In the case of *Cardillo, Deputy Commissioner, v. Liberty Mutual Ins. Co.,* 330 U. S. 469 (1947), the court stated at page 477:

> "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. * * *"

See also:

South Chicago Coal & Dock Co., et al. v. Bassett, Deputy Commissioner, 309 U. S. 251 (1940);

Del Vecchio v. Bowers, 296 U. S. 280 (1935);

Voehl v. Indemnity Insurance Co. of North America, 288 U. S. 162 (1933);

Crowell, Deputy Commissioner, v. Benson, 285 U. S. 22 (1932);

Jules C. L'Hote, et al. v. Crowell, Deputy Commissioner, 286 U. S. 528 (1932), 71 C. J. 1297, Sec. 1268;

Parker, Deputy Commissioner, v. Motor Boat Sales, Inc., 314 U. S. 244 (1941);

Marshall, Deputy Commissioner, v. Pletz, 317 U. S. 383 (1943).

In this connection, it should be noted that the coal in the sling which the deceased ordered taken aboard the vessel was to have been placed on the vessel as part of the ship's stores sooner or later [T. 28], and further it should be noted that this was often done by the longshoremen [T. 36], which fact was admitted by Mr. Bliss, the mate of the vessel [T. 41]. It would appear therefore that the loading of the coal was a routine operation and with the scope of the deceased's employment. Whether the performance of such an operation in a manner different from that prescribed, changes the status of the employee will be discussed below. Whether any unequivocal orders had been disobeyed may be questioned by a proper inference from the evidence. The witness Tornquist, who was driving the winch at the direction of the deceased, testified that almost immediately after talking with the mate of the vessel the deceased ordered the witness to pick up the coal. It may be reasonable to infer that the deceased had spoken to the mate concerning the coal and had not received unequivocal instructions or orders to move it, the testimony of Mr. Bliss to the contrary notwithstanding. It is solely within the province of the Deputy Commissioner or compensation administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability:

Wilson & Co. v. Locke, Deputy Commissioner, 50 F. 2d 81 (C. C. A. 2nd, 1931);

Naida v. Russell Mining Co., 159 Pa. Super. 155, 48 A. 2d 16 (1946);

Griffin's Case, 315 Mass. 71, 51 N. E. 2d 768 (1944);

Pittsurgh Plate Glass Co. v. Morgeson, 177 P. 2d 115 (Okla. 1947);

Lockheed Aircraft v. Industrial Accident Commission, 28 Cal. 2d 756, 172 P. 2d 1 (1946);

Square D Co. v. O'Neal, 66 N. E. 2d 898 (Ind. App. 1946).

VIOLATION OF ORDERS.

Assuming that deceased was told not to use the No. 1 gear to bring the coal on board because it was necessary to use No. 2 gear for the starboard side where the coal was to be stored, his injury nevertheless arose out of and in the course of his employment. The injury or death of an employee under the Longshoremen's Act may be compensable as arising out of and in the course of his employment, notwithstanding the alleged violation of instructions by an employee.

Capital Transit Co. v. Hoage, Deputy Commissioner, 65 App. D. C. 382, 84 F. 2d 235;

Bull Insular Line, Inc., et al., v. Schwartz, Deputy Commissioner, et al., 23 Fed. Supp. 359 (N. Y. 1938).

In the *Capital Transit Company* case, *supra,* where the employee was killed while making a test by means of an electrical current, in violation of specific instructions to stay away from electrical current, the court said:

> "Therefore, although Parrott while engaged in the work did not obey the instructions given to him by his employer, he continued nevertheless to work in the employment of the employer and his accidental death arose out of it."

This is a leading case and is on all fours with the instant case in that it involves a violation of an instruction relating to an act connected with the employee's work.

Many cases are cited in the opinion just quoted (which involve construction of the Longshoremen's Act as applied to employment in the District of Columbia) to the effect that violation of a rule does not *necessarily* bar the right to compensation. Although the administrators of the compensation law and the courts in the beginning were inclined to reject compensation claims for injury sustained while the employee was violating instructions, it soon became apparent that the purpose of the compensation law, namely, that the particular industry where the injury was sustained should take care of the injured employee and his dependents, was not being fulfilled by denying compensation in all cases where the injury occurred while the employee was violating instructions.

In the course of time certain principles were adopted with reference to cases where a defense was interposed that the employee was injured while violating a rule or instruction. We shall enumerate only those which are applicable to the instant case. The courts stated

(1) That the violation of a rule or instruction, to constitute a bar to compensation, must amount to *willful misconduct.*

Nickersons' Case, 218 Mass. 158 (1919);

Sloss-Sheffield Steel Co. v. Green, 113 So. 271, 216 Ala. 267 (1927);

Belyus v. Wilkinson, 178 Atl. 181, 115 N. J. L. 43 (1935);

Black Mountain Corp. v. Higgins, 10 S. W. 2d 463, 226 Ky. 7 (1928).

The *Belyus* case, *supra,* is typical. In that case the court said that the word "willful" means improper, deliberate conduct, premeditated obstinacy, and intentional wrong-

doing, with knowledge that it is likely to result in serious injury, or wanton and reckless disregard of its probable consequences. The construction and interpretation of the compensation law in the cases just cited are in accord with the construction placed upon the Longshoremen's Act by the United States Court of Appeals for the District of Columbia in *Hartford Accident and Indemnity Co. v. Cardillo, Deputy Commissioner,* 112 F. 2d 11 (1940), cert. den. 310 U. S. 649. The latter Court stated that the kind and degree of acts resulting in injury for which recovery is barred is indicated, first, by the broad presumption which is set forth in the statute in favor of compensability (section 20—33 U. S. C. A., section 920), and, second and more explicitly, by the provision by which Congress has expressed clearly its intention concerning the kinds of acts which bar recovery when done by claimant, namely, that

> "No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee *or by the willful intention of the employee to injure or kill himself or another.*" (Italics supplied by court.)

The court concluded as follows:

> "The provision, reinforced by the statutory presumptions and the Act's fundamental policy in departing from fault as the basis of liability and of defense, except as specified, is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, illegality, etc., *unless it amounts to the kind and degree of misconduct prescribed in definite terms of the Act.*" (Italics supplied.)

(2) A second rule or principle enunciated by the courts in connection with the "violation of instruction" defense is that if the employee, at the time of injury, is doing something which is part of his job or incidental to it, but the violation of the rule consists in the *manner in which it is being done*, the violation will not bar the right to compensation.

Smith v. Industrial Accident Commission, 18 Cal. 2d 843, 118 P. 2d 6 (1941);

Ricci v. Katz, 44 N. Y. S. 2d 781 (1944);

Estler Bros. v. Phillips, 15 B. W. C. C. 291 (Eng. 1922);

Chila v. N. Y. Central R. R. Co., 297 N. Y. Supp. 850 (1937);

Wallace v. Rex Fuel Co., 216 Iowa 1239, 250 N. W. 589;

Omaha Boarding & Supply Co. v. Industrial Comm., 306 Ill. 384, 138 N. E. 106.

Applying these two principles to the instant case, it is apparent that the deceased in using the No. 1 gear instead of No. 2 gear to bring the coal aboard, if he was violating an instruction (assuming the mate so instructed) as to the manner of doing the work, was nevertheless doing something incidental to the deceased's job of loading and unloading the vessel. Moreover, his action if he disregarded the instruction was not such misconduct of such willful nature of the kind and degree specified in the statute as to bar recovery, which would amount to "willful intention of the employee to injure or kill himself or another" (33 U. S. C. 903(b)). The quoted language

supplies the only basis for defense in proper cases. Indeed the accident might well have happened with the use of one gear as the other. The end result in this case was not such as could have been foreseen.

Plaintiff alleged (paragraph VII of complaint) that because the deputy commissioner "surmised" at the reason why the deceased wanted to obtain an empty sling, the finding and award is "based upon mere surmise." Since the operation of loading the coal upon the vessel was not an act foreign to deceased's general duties, the secondary purpose which deceased may have had in mind in so doing (for example, the removal of the lumber trash) would be immaterial, although the removal of the lumber trash from the vessel would also have been incidental to the employment, albeit the deceased was doing two things (1) getting rid of trash, and (2) incidentally making such trash available for someone else's use. An almost identical type of activity is to be found in *Voehl v. Indemnity Insurance Co. of N. A.*, 288 U. S. 162, a case in which the employee went to his employer's establishment on a Sunday to clean up the place and remove trash which he intended to haul to his home for his personal use. An injury enroute to accomplish such purposes was held within the Act. So in the instant case that the transfer of the coal to the vessel was related to the release of a sling which might be used to unload lumber, presumably for the wife of a crew member, does not change the fact that both the loading of the coal and the unloading of the lumber might fairly be considered within the deceased's sphere of duties. The deputy commissioner could have used the word "inferred" instead of "surmise," as what the order contains is a finding based upon a reasonable inference from the evidence. Logical deductions and in-

ferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable.

Parker, Deputy Commissioner v. Motor Boat Sales, Inc., 314 U. S. 244 (1941);

Liberty Mutual Ins. Co. v. Gray, Deputy Commissioner, 137 F. 2d 926 (C. C. A. 9th, 1943);

Michigan Transit Corp. v. Brown, Deputy Commissioner, 56 F. 2d 200 (Mich. 1929);

Del Vecchio v. Bowers, 296 U. S. 280 (1935) (*supra*);

Eastern Steamship Lines, Inc. v. Monahan, Deputy Commissioner, et al., 21 Fed. Supp. 535 (Me. 1937);

Grain Handling Co., Inc. v. McManigal, Deputy Commissioner, 23 Fed. Supp. 748 (N. Y. 1938);

Simmons v. Marshall, Deputy Commissioner, 94 F. 2d 850 (C. C. A. 9th, 1938);

Lowe, Deputy Commissioner v. Central R. Co. of New Jersey, 113 F. 2d 413 (C. C. A. 3rd, 1940);

Contractors, PNAB v. Pillsbury, Deputy Commissioner, 150 F. 2d 310 (C. C. A. 9th, 1945).

It is alleged in paragraph VII of the complaint that the injury and death of John A. Anderson was not an accidental injury and death arising out of and in the course of the employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, but was the result of his own misconduct in that he violated instructions of the ship's mate.

Section 4 of the Longshoremen's Act, subdivision (b) thereof, 33 U. S. C. A., section 904(b), reads as follows:

"Compensation shall be payable irrespective of fault as a cause for the injury."

From the foregoing, it will be seen that it is immaterial whether or not the injuries of the employee were occasioned by reason of his fault, negligence or disobedience *so long as they were not occasioned solely by his intoxication or his willful intention to injure himself or another.*

> *Hartford Acc. and Indemnity Co. v. Cardillo,* 112 F. 2d 11.

Neither negligence of the employee (if negligence is an ingredient of violation of instructions) nor increased risk resulting from the employee's conduct are defenses under compensation law. As the court stated in *Employers' Liability Assurance Corp. v. Hoage,* 69 F. 2d 227 (1934):

> "Stress was laid in the argument on the rate of speed in which the automobile was being driven at the time of the accident. Granted this was shown by the evidence, it was no more than a showing of negligence, and granted further that this increased the normal risks of the employment, it would not defeat an award because by the terms of the act compensation is payable irrespective of fault as a cause of the injury (section 4(b), 33 U. S. C. A., sec. 904(b))."

The courts also reject the idea that the question of compensability is dependent upon the discretion of judgment exercised by the employee. In *Scott v. Hoage, Deputy Commissioner,* 63 App. D. C. 391, 73 F. 2d 114 (1934), it was stated:

> "The question of compensation, however, does not depend upon the discretion exercised by deceased for his personal safety under these circumstances. Contributory negligence is not a defense to a claim for compensation."

See also:

Security Mutual Casualty Co. v. Wakefield, 108 F. 2d 273 (C. C. A. 5th, 1940);

Moore v. Cincinnati, N. O. & P. Ry. Co., 148 Tenn. 561, 256 S. W. 876 (1923).

Appellants' Brief.

Appellants state (page 4 of their brief) that "when the facts relative to the employee's duties are undisputed" it becomes "a legal problem" as to "whether an employee was in the course of employment at the time of injury." In this connection the Supreme Court recently stated in *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Co.*, 330 U. S. 469, 478 (1947):

> "It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm v. Commissioner*, 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio v. Bowers, supra*, 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor Board v. Hearst Publications*, 322 U. S. 111, 131; *Commissioner v. Scottish American Co.*, 323 U. S. 119, 124; *Unemployment Compensation Commission v. Aragon*, 329 U. S. 143, 153-154. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident

> that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only 'if not in accordance with law.'
>
> "Our attention must therefore be cast upon the inference drawn by the Deputy Commissioner in this case that Ticer's injury and death did arise out of and in the course of his employment. If there is factual and legal support for that conclusion, our task is at an end."

This pronouncement was consistent with previous statements in similar cases.

> *Puget Sound Freight Lines v. Marshall, Deputy Commissioner,* 125 F. 2d 876 (C. C. A. 9th, 1942);
>
> *Gray v. Powell,* 314 U. S. 402, 412 (1941).

Appellants also contend (page 5 of their brief) (a) that the rule at common law prevented a servant from recovering from the master for injury proximately caused by the servant's violation of the master's orders, (b) that the Workmen's Compensation Acts were not designed to change the common law rule in this regard (citing one case in *1917*), and (c) that the same rule applied in cases under the Federal Employers' Liability Act. While appellants have not stated the conclusion they wish the court to draw from the premise they state, it is apparent from their "Restatement Rule" on page 6 of their brief to the effect that the servant has no "cause of action" for the master's negligence concurred in by the servant's violation of orders, that they are urging that the *common law rule* should apply in the instant case to bar the right of the

widow of the deceased employee to compensation because of an alleged violation of an order. Common law tests and rules of liability have no place in remedial legislation in *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111 (1943). In *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company,* 330 U. S. 469 (1947) (*supra*), at page 481 the court stated:

> "Indeed, to import all the common law concepts of control and to erect them as the sole or prime guide for the Deputy Commissioner in cases of this nature would be to encumber his duties with all the technicalities and unrealities which have marked the use of those concepts in other fields."

This apart from the fact that the Longshoremen's Act itself provides that "compensation shall be payable *irrespective of fault* as a cause for the injury" (Sec. 4(b), 33 U. S. C. A., Sec. 904(b)).

Appellants have cited many cases on page *7 et seq.* of their brief. We do not believe that it is incumbent upon us or necessary to comment upon each case individually. Most of the citations are old and arose when compensation laws were new and at a time when the administrators of compensation law and the courts had difficulty in construing the law other than by following common law standards, and also at a time when it was believed that dire results would follow other than a strict construction of a law which awarded an employee compensation, without fault on the part of the master. Other cases cited by appellants relate to "horseplay" and other factual situations not pres-

ent in the instant case. The so-called leading British case (*Herbert v. Fox* (1916)), cited on page 8 of appellant's brief, which appellants state was cited with approval in *Cardillo v. Liberty Mutual Insurance Company,* 330 U. S. 469 (1947) (*supra*), at page 479, footnote 4, was not cited there with approval as to its holding that a workman riding on the front of a car, instead of walking ahead of it, cannot recover compensation, but to emphasize the statement of the court in that case that the words "arising out of and in the course of employment" have been the source of a mass of decisions "turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion."

With reference to the case of *Contractors v. Pillsbury,* 150 F. 2d 310 (C. C. A., 1945) (*supra*), cited on the last page of appellants' brief, we are unable to discern the purpose of said citation since it does not, so far as we can perceive, pertain to the matter which precedes it. It does not refer to increased insurance premiums, the subject matter immediately before the citation (incidentally, there is nothing in the record to support the intimation that the allowance of the instant case, or similar cases, would increase insurance premiums), nor is there any reference in said opinion to the misconstruction of the Act which would "make employers insure employees against injury arising from violation of orders for private, non-business purposes," the next preceding matter. Perhaps it is cited in support of the next preceding statement that "the Act is entitled to liberal construction to accomplish its purpose."

Conclusion.

It is respectfully submitted that the evidence and the permissible inferences to be drawn therefrom support the finding that the deceased's death arose out of and in the course of employment. Moreover, Section 20 of the Act (33 U. S. C. A., Sec. 920) raises the presumption that the deceased's injuries arose out of and in the course of the employment; in addition to this statutory presumption there is the presumption which the courts have recognized independently of said statutory presumption that the injury arose out of and in the course of the employment where it occurs on or about the industrial premises.

The determination of the deputy commissioner complained of has "warrant in the record" and a "reasonable basis in law" and should be accepted upon judicial review. *N. L. R. B. v. Hearst Publications Inc.*, 322 U. S. 111, 131 (1944), (*supra*).

The judgment of the court below was proper and should be affirmed.

Respectfully submitted,

James M. Carter,
United States Attorney,

Clyde C. Downing,
Asst. U. S. Attorney,
Chief of Civil Division;

Leila F. Bulgrin,
Asst. U. S. Attorney,

Attorneys for Appellee, Warren H. Pillsbury.